IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of

TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHLSTEDMAN CO., et al.,
Respondents.

PETITION OF ROY G. HARRIS and BENJAMIN F. J. ODELL FOR REHEARING.

Come now the above-named petitioners, Roy G. Harris and Benjamin F. J. Odell, and present this, their petition, for a rehearing of this case, and, in support thereof, respectfully show:

I.

JURISDICTION

This court affirmed the judgment of the lower court in this cause on November 21, 1938. This petition is filed within less than 25 days thereafter, under Rule 33 (28 U. S. C. A. Sec. 354).

II.

REASONS FOR PETITION FOR REHEARING

This court has labored under several erroneous impressions as to what the record shows. We shall point out several conclusions in this court's opinion which are in direct conflict with the record.

This court has erroneously assumed that the courts below found that petitioners were agents of the bankrupt.

This court based its entire opinion upon the assumption Harris and Odell were agents of the bankrupt.

The opinion says:

> "Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in bankruptcy was filed and thereafter. * * *" (Court's opinion page 3.)

This statement is entirely unjustified because THE TRIAL COURT MADE NO FINDING WHATSOEVER ON AGENCY. There is nothing whatever in the record which directly or indirectly shows a finding by the trial court that Harris and Odell were agents of the bankrupt.

The Circuit Court of Appeals said the record did not show that Harris and Odell were agents of the bankrupt (Rec. 132, line 15) and admitted that it might be wrong in finding agency (Rec. 132, line 30) and admitted that the record was confusing in some respects (Rec. 133, last sentence).

Therefore the Supreme Court is mistaken in its assertion that both courts below found Harris and Odell were agents of the bankrupt.

In this respect the petition under oath, filed by respondents themselves (Rec. 18-38), alleged that Harris and Odell were agents of the respondents. The language used in that petition is:

"* * * In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, [respondents here] * * *" (Rec. 28).

"The petitioners, [respondents here] * * * on May 10, 1937, requested Benjamin F. J. Odell to cease from acting as attorney or representative of the petitioners. * * *" (Rec. 31).

"The petitioners, [respondents here] * * * on May 19, 1937, requested R. G. Harris to cease from acting for or representing any of the petitioners. * * *" (Rec. 32).

(NOTE: THE INVOLUNTARY PETITION WAS FILED MAY 3, 1937. THEREFORE RESPONDENTS WERE PROTESTING EVEN AS LATE AS MAY 19, 1937, THAT THE ESCROW TRUSTEES WERE THEIR AGENTS.)

"* * * in which moneys neither the Tax Service Association of Illinois, William L. O'Connell, Jr., Receiver * * * have any right or interest, but said Odell, Harris and Craig have the duty to disburse that part of the Fund deposited by petitioners [respondents] in accordance with the directions and re-

quest of petitioners" (Respondents' Petition, Rec. 28).

Even the contract relied upon so confidently by respondents discloses that ODELL WAS THE AGENT AND ATTORNEY OF RESPONDENTS AND NOT OF THE BANKRUPT. We quote:

> "* * * Should it become necessary to prosecute or defend an appeal to the Illinois Supreme Court, the Tax Service Association agrees to assist and aid the designated *subscribers and their attorney* Ben F. J. Odell, * * * " (Italics ours) (Rec. 23).

If any inference is to be drawn from the silence of the trial court on the question of agency, it must be that the trial court found these petitioners to be agents of the contractors; and by implication not agents of the bankrupt.

While petitioners appreciate the operation of the principle that this court will not go into questions of fact settled by the Circuit Court of Appeals, it is submitted that this principle is not applicable here, inasmuch as the fact of agency has not been settled in the courts below. Therefore it seems incumbent upon this court either to determine the question of agency for itself, or to remand the case to the District Court for the determination of this question.

Further, the conclusion that Harris and Odell were agents of the Tax Service Association is wholly inconsistent with the facts which appear in the record as pointed out at length in Brief for Petitioners, Pages 24-27.

Petitioners could not be agents of the Tax Service Association because the record shows:

THE TAX SERVICE ASSOCIATION HAD NO POWER TO REMOVE THE ESCROW TRUSTEES.

THE TAX SERVICE ASSOCIATION COULD NOT WITHDRAW ANY OF THE FUNDS.

THE ESCROW TRUSTEES COULD NOT BIND THE TAX SERVICE ASSOCIATION.

TITLE TO THE FUNDS WAS IN THE ESCROWEES AND NOT IN THE TAX SERVICE ASSOCIATION.

PETITIONERS HAD NO CONTROL OVER THE FUNDS WITHOUT THE APPROVAL OF TRUSTEE CRAIG WHO DENIED HE WAS AGENT OF THE BANKRUPT (REC. 47) AND WHICH RESPONDENTS ADMITTED. (REC. 28.)

THE RESPONDENTS ALLEGED THE TAX SERVICE ASSOCIATION HAD NO INTEREST WHATEVER IN THE ESCROW FUND (REC. 28).

NEITHER THE TAX SERVICE ASSOCIATION NOR THE RECEIVER HAVE CLAIMED PETITIONERS WERE BANKRUPT'S AGENTS.

THE VERY OBJECT OF ESCROWING THE FUNDS WAS TO PREVENT DOMINATION BY THE TAX SERVICE ASSOCIATION OR ANYBODY ELSE, SAVE THE THREE TRUSTEES JOINTLY.

This court has misconstrued the "agreed order", and overlooked entirely both its limited nature and the duress by which it was procured.

This court in its opinion has stated:

> "* * * Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a summary proceeding. * * *" (Court's opinion, pages 3-4).

The contention of consent is one of the main issues in controversy. These petitioners find themselves apparently precluded here by the assumption of this court that they consented to the jurisdiction of the District Court to disburse the funds in controversy. At most, petitioner

consented to disbursal of a portion of a larger fund, or perhaps more accurately stated, a withdrawal from the controversy of a portion of the funds in escrow.

This court seemingly takes no cognizance of the necessarily extended argument of petitioners with respect to consent in their brief (pages 34-47). We endeavored to point out that not only did the literal language of the so-called "consent order" not extend to the ultimate disbursal of the fund, but even such consent as may have appeared was wholly negatived by duress; also that there was a general understanding among parties to that litigation in the Bankruptcy Court (Rec. 62, 93-94) that the said order was entered without prejudice to objections to the jurisdiction of the court; moreover, that consent alone cannot confer jurisdiction on any federal court.

The erroneous assumptions with respect to agency and consent led this court to ignore entirely the fundamental issue of jurisdiction presented.

The erroneous assumption of the existence of agency and the erroneous assumption of the presence and actuality of consent prevented this court from considering the question of jurisdiction inasmuch as it was assumed that this was an ordinary proceeding in bankruptcy. If the court had entered upon a consideration of the questions of agency and consent, and had determined either in the negative, it would then have been confronted squarely with the jurisdictional question which your petitioners have urged not only upon this court but upon both courts below. Your petitioners confidently submit that had such question of jurisdiction been considered, this court could have reached but one conclusion, *i. e.*, that this litigation involves a controversy which is not cognizable by a

court of bankruptcy upon any theory, and in connection with which there is no necessity whatever for inquiring whether an adverse claim has or has not been set up (Brief for Petitioners, page 14).

However, assuming an adverse claim to have been necessary to defeat jurisdiction, the opinion makes it difficult to understand why we should be penalized for failure to set up an adverse interest when we sought to do so and were denied that right, which fact incontrovertibly appears in the record (Rec. 96). Upon the first indication that the court was going to overrule petitioners' motions to strike interveners' pleadings, your petitioners instantly asked leave to file a pleading setting out such substantial adverse interest, which leave was denied (Rec. 96). Such pleading would have disclosed not only substantial adverse claims in petitioners as individuals, but as fiduciaries and trustees as well.

This court has overlooked the fact that the pleadings on file in this case do not state a controversy cognizable in any Federal Court.

It is clear that if the assumption of agency be investigated and negatived there is no theory upon which jurisdiction can be predicated. Certainly jurisdiction cannot be conferred upon a Federal Court by consent alone. It is earnestly submitted that if, in the absence of agency, the court sustains jurisdiction of this controversy, there is no possible litigation, jurisdiction of which cannot be conferred upon a Federal Court by intervention in some pending bankruptcy proceeding selected at random. We can see no point at which the court could draw the line.

It seems to your petitioners that the task of this court

in the instant case, as well as the task of the District Court, is very simple. The pleadings filed by the intervenors were before the District Court; they are now before this court as part of the record. These pleadings, as indicated in our brief at pages 40-47, do not state a cause of action cognizable in any federal court. Hence the District Court should have dismissed the proceeding on its own motion and this court should now reverse the previous decision in this proceeding and order the litigation dismissed.

Apparently this court sanctions by silence the flagrant denial by the District Court of any semblance of due process of law.

This court has recently concerned itself in the Morgan case with the constitutional right of parties to be heard before administrative tribunals and officials. Yet in its instant opinion in this case the court declines even to comment upon the strenuous contention consistently urged by your petitioners that they have been deprived of property by a Federal Constitutional Court without any opportunity whatever to be heard. This error was discussed in full in our brief pages 47 to 55 and in our reply brief pages 19 to 21.

Certainly in this case there has been scant consideration for petitioners' rights. The Circuit Court of Appeals purports to hold that petitioners have no rights even with respect to the $20,000 balance (Rec. 133), notwithstanding the fact that no issues have ever been framed with respect to the $20,000, and notwithstanding the fact that such issue has not yet been determined by, but is still pending before, the District Court.

Certainly this court cannot intend to approve the Cir-

cuit Court of Appeals action in making findings on issues not before that court.

Interest on Funds.

The Circuit Court of Appeals have charged petitioners with interest, and this court by saying nothing upon that subject would also seemingly hold petitioners liable for interest. Carrying this case to this court of last resort was incumbent upon your petitioners as trustees. It has been, and is, petitioners' position that the trial court in ordering them to turn over these funds, not to the beneficiaries, but to the so-called special committee of three, was and is wholly without jurisdiction. Disbursing these funds in such fashion, pursuant to an order of court void for want of jurisdiction, could not absolve your petitioners from an accounting liability to all the contractors. The order did not require the committee to distribute the funds in accordance with the trustees' obligations to return it to the contractors. Petitioners can be protected only by decision of this court. It is manifestly unjust to charge these petitioners personally with interest in this cause especially as the order appealed from was to compel a physical act—sign a check—and not for a decree for the payment of money as contemplated by Rule 30. These petitioners have personally been required to advance substantial costs in their effort to protect their beneficiaries, and interest should not be made an additional personal liability.

CONCLUSION.

The principal basis of the decision both in the Circuit Court of Appeals and in this court is the assumption that petitioners were agents for the alleged bankrupt, that they were not trustees, that there is no substantial adverse interest in the petitioners anywhere disclosed, and that in no sense were the funds deposited for the benefit of either of the petitioners. Contrast these assumptions with the actual situation as it appears from respondents' own language. In the first intervening petition (Rec. 28) respondents alleged:

> "* * * said Craig, Harris and Odell were acting as the agents and representatives of the petitioners, * * * and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, * * *"

i. e., they held funds as agents for both parties, which translated into legal verbiage would make them trustees. In the Reply Brief for Respondents (their last brief, page 10) respondents state:

> "Whether petitioners were 'trustees', as they claim, or agents or stakeholders, the respondents were the beneficiaries of the Escrow Fund. * * *"

i. e., they admit that petitioners were trustees and respondents the beneficiaries. In the conclusion to respondents' principal brief (page 69) respondents admit that one of the objects of the creation of the trust was to guarantee to Odell the payment of his fees. Thus respondents admit that petitioners were not agents but trustees and that one of the purposes of creating the trust was to insure, was to protect, Odell in his fees, thus conceding a substantial adverse interest in the fund, if such be necessary. Moreover, in the same conclusion and

in the same paragraph (Brief for Respondents, page 69), respondents admit that the so-called "consent order" was entered into by your petitioners under compulsion of possible personal liability of $100,000. Thus we find in respondents' own language the admission of duress which this court has apparently ignored when it came from petitioners' lips.

Let us see just what the circumstances of this underlying situation are, shorn of intentionally misleading technical diversions:

In March and April, 1937, preparations were being concluded by the escrow trustees for the orderly distribution of the Escrow Funds (1) to the State of Illinois, and (2) to the contractors, less agreed deductions. While the escrowees were thus engaged, the so-called "special committee" appeared on the scene.

First this special committee suborned some of Odell's clients and induced them to execute a power of attorney authorizing that committee "to terminate all relations with any attorney heretofore representing the said petitioners * * *" and to "* * * incur such expenses, including attorney's fees as may be necessary * * *" (Rec. 31).

Here is revealed the real motive for the intervention by the special committee, *i. e.*, the possibility of obtaining fees and expenses for itself and its attorney and the possibility of depriving Odell of a reasonable fee for his services for which the Escrow Fund had been created.

On May 10, 1937, the committee, with no grounds whatsoever, decided to discharge the contractors' attorney and agent, Odell (Rec. 31).

On May 19, 1937, the committee decided that they would discharge agent Harris (Rec. 32).

There were absolutely no grounds, alleged or otherwise, for the wrongful discharge or removal of petitioner Odell and there was no offer, in the record or otherwise, to pay him anything for his services. By thus interfering with the duties of the escrow trustees, the special committee succeeded in hindering the distribution of the Escrow Funds to the State and to the contractors.

On May 24, 1937, only a week before the "dead line" for payment of the tax money to the State, the Committee filed its petition and tied up the funds so that it became impossible to pay the State and avoid the impending $100,000 penalty unless "consent" was given to the "agreed" order. Petitioners, considering only their duty to their beneficiaries, approved the order, but with an explicit understanding jurisdiction was not waived (Rec. 93, 62). When petitioners attempted to assert an adverse claim, they were prevented by the court from so doing (Rec. 96).

The opinion of this court now condemns and penalizes these petitioners for their faithfulness to their beneficiaries, and that opinion likewise endorses the predatory tactics of the intervening committee.

For the reasons herein shown it is respectfully urged that petitioners herein be granted a rehearing; that the proceedings in the lower courts be, upon further consideration, reversed, or in the alternative that the case be remanded to the trial court for hearing on the merits; that the opinion of the Circuit Court of Appeals be modified to eliminate interest charges wrongly assessed against petitioners, and that there be stricken from the opinion of the Circuit Court of Appeals language deciding matters not in issue (more specifically with respect to Odell's right to receive his compensation for his services, and

with respect to petitioners' rights in the $20,000 balance, etc.).

Respectfully submitted,

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

We, Benjamin F. J. Odell and Kenart M. Rahn, counsel for petitioners in the above entitled cause, do hereby certify that the foregoing petition for rehearing in this case is presented in good faith and not for delay.

BENJAMIN F. J. ODELL,
KENART M. RAHN,
Attorneys for Petitioners.